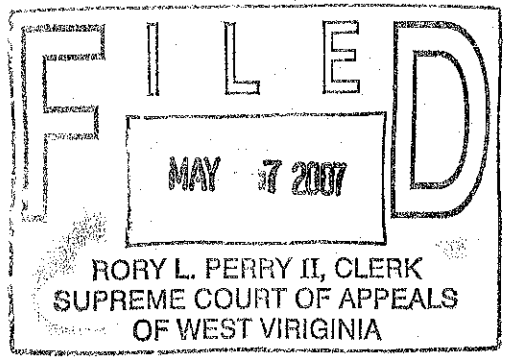
No. 33325

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



BRIAN M. POWELL,

Appellant,

v.

STEVEN L. PAINE, STATE SUPERINTENDENT OF SCHOOLS,

Appellee.

APPELLEE'S BRIEF

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Appellant,

v.

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Appellee.

APPELLEE'S BRIEF

I.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

COMES NOW the Appellee, Steven L. Paine, State Superintendent of Schools, by and through counsel, Katherine A. Campbell, Assistant Attorney General, and submits this *Brief* pursuant to the *Order* dated February 28, 2007.

The State Superintendent defends in this brief his decision to suspend for four years the certificates of a teacher and high school football coach who beat his young son at home. A ruling by this Court to reverse the State Superintendent's decision or to reduce the length of the suspension would undermine the important goals of the revocation process which are to protect students and other staff members, to bolster the integrity of educational process and the confidence of the public in public education and to deter other teachers from such conduct.

Children have a constitutional right to a public education and the law mandates compulsory education. Parents who chose to have their children educated in the public school system must entrust the children's well being and safety to its teachers and administrators. In fact, West Virginia law provides that teachers stand in the place of parents during the school day exercising authority and control over pupils. Because parents are compelled by the state to place their children under the sole care and control of educators in the public school system during the school day, there is a high duty to ensure that teachers licensed by the state are morally and ethically fit to exercise the authority and control over the children entrusted to them.

II.

STATEMENT OF FACTS

This case began as an administrative appeal to the Kanawha County Circuit Court which subsequently upheld an *Order* dated December 9, 2005, from Steven L. Paine, State Superintendent of Schools, which accepted the West Virginia Commission for Professional Teaching Standards' (hereinafter "Panel") recommended decision suspending Appellant's, Brian M. Powell, teaching certificate for four years. The facts in this matter are well developed and not in dispute.

Appellant, Brian M. Powell, was a science teacher and football coach at Moorefield High School in Hardy County. Appellant's then nine year old son, Bryce, attended Moorefield Elementary School, and on or about September 24, 2004, was sent home from school with a disciplinary form requiring a parent signature. Bryce apparently had been disciplined at school for making sexually inappropriate comments about several classmates. Bryce first approached his stepmother for a signature, but she told him to take the form to his father. *See* October 25, 2005, Record at 106 (hereinafter referred to as 10/25/05 R.__). When Bryce went to his father, the Appellant, he asked

him what he said to his classmates. *See* 10/25/05/ R. at 106. Bryce told him he did not know what he said. *See* 10/25/05 R. at 111. At this point the Appellant went to his bedroom, got a belt, and proceeded to beat his son across his back until he could remember what he said to his classmates.[1] At the Panel hearing, Appellant admitted beating his nine year old son until he heard what he wanted to hear from him.[2] Bryce finally relented and told the Appellant what he wanted to hear and the beating ended. *See* 10/25/05 R. at 112. Incredulously, the Appellant testified that he then noticed a red mark on Bryce's back and wondered where his son had gotten a mark. Appellant asked Bryce where he got the red marks and began to put ice packs on the area. *See* 10/25/05 R. at 112. Appellant stated he was unaware of the physical harm he had inflicted upon his nine year old son. *See* 10/25/05 R. at 112. The next day, Bryce went to school and told several classmates his father had beaten him. Eventually word spread to the school staff and Bryce was called into the Principal's Office. The school staff discovered significant injuries to Bryce's back and shoulder.

The Moorefield Elementary School Principal, Beverly Coppe, questioned Bryce about this beating he had been telling his classmates about earlier that day. Ms. Coppe had the guidance counselor with her at the time of this interview. Bryce showed Ms. Coppe and the guidance counselor his injuries which Ms. Coppe testified were on his left shoulder and down his back and consisted of

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[1]It should be noted that if this beating administered by the Appellant were in fact corporal punishment as the Appellant states that it was intended, then the Appellant would have to know what offense he was punishing his son. Moreover, there would have been a set number of "whips."

[2]Appellant was asked, '[s]o, in fact, you were beating him until he told you what you wanted to know, which was the purpose of the detention?" Appellant answered "[y]es." *See* 10/25/05 R. at 137.

red marks and welts.[3] *See* 10/25/05 R. at 35. The West Virginia Department of Health and Human Services (hereinafter "WVDHHR") was called and subsequently Bryce along with two of his younger siblings were taken from the home and placed in foster homes. Moreover, the Hardy County Prosecutor was contacted in order to begin a criminal investigation into this matter.

State Trooper, Sgt. Steve Reckart, conducted a criminal investigation and interviewed several of the Appellant's children, including Bryce. Sgt. Reckart testified when he interviewed Bryce that he appeared "stressed" and "under pressure." *See* 10/25/05 R. at 45. Sgt. Reckart testified that Bryce changed his story as to how many times he was beaten by the Appellant. *See* 10/25/05 R. at 44. Initially, he told Sgt. Reckart he had been struck by his father thirteen times, but then changed the number to four. *See* 10/25/05 R. at 44. Ultimately the Appellant was charged with felony child abuse for beating Bryce. However, Appellant later pled to a misdemeanor count of domestic battery and was sentenced to thirty days of incarceration which he chose to serve on the weekends and holidays.[4] Appellant also had to pay a fine. Moreover, WVDHHR conducted its own investigation which substantiated abuse of Bryce. The children, including Bryce, were all returned to the home approximately 2 and a half months after removal, and as part of the improvement plan with WVDHHR the Appellant had to undergo psychiatric evaluations along with on-going counseling. The Appellant was later released from WVDHHR's custody in May 2006.

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[3]Pictures were taken at this time of the physical injuries by Ms. Coppe with her cellular telephone at the request of the West Virginia Department of Health and Human Services. These pictures have become part of the record in this matter. *See* 10/25/05 R. at 36 and Exhibits numbered 5 and 18.

[4]It should be noted that the Appellant chose to serve his thirty days of incarceration over the holidays and weekends, thereby increasing his own jail costs.

As for the Appellant's teaching position with Hardy County, the Superintendent of Hardy County, Ron Whetzel, placed the Appellant on notice that he was waiting to see the outcome of the WVDHHR's investigation before taking action. He did testify that the Appellant told him that he had only hit his son Bryce once with the belt. *See* 10/25/05 R. at 64. Before the WVDHHR investigation was completed the Appellant was criminally charged, and at that point he was suspended with pay pending the outcome of the criminal action. Appellant's subsequent plea of guilty to a misdemeanor count of domestic battery launched Hardy County Schools' own investigation into the matter. Superintendent Whetzel then recommended that the Appellant be placed on suspension without pay from which he ultimately recommended the Appellant's dismissal before the Hardy County School Board. Superintendent Whetzel testified that the Appellant was unfit to be a teacher. *See* 10/25/05 R. at 81. The Hardy County School Board chose not to accept the Superintendent's recommendation of dismissal and ordered Appellant to undergo psychological evaluation. The Board stated it would base its decision upon the results of the evaluation. Based upon the results of the subsequent evaluation Appellant was able to return to work on January 12, 2006, with no further discipline taken against him by the Hardy County School Board; however, Superintendent Whetzel testified he continued to have parent complaints about the Appellant's teaching and coaching performance. *See* 10/25/05 R. 68-69.

Moreover, Superintendent Whetzel notified the State Superintendent's Office of the action taken against the Appellant as required by W. Va. Code § 18A-3-6. Subsequently, the State Superintendent issued a *Notice* dated October 6, 2005, initiating proceedings against the Appellant's teaching license. A hearing was held before the Panel, and a *Recommended Decision* was issued by the Panel on December 5, 2005, which recommended the Appellant's certification be suspended for

a period of four years. Upon reviewing this *Recommended Decision* by the Panel, the State Superintendent adopted the *Recommended Decision* in its entirety, and signed an *Order* entered on December 9, 2005. Subsequently, the Appellant appealed this matter pursuant to W. Va. Code § 29A-5-4, of the West Virginia Administrative Procedures Act, to the Kanawha County Circuit Court. After hearing oral arguments in this matter on May 18, 2006, the Honorable Louis H. Bloom affirmed the previous *Order* by a *Final Order* dated May 26, 2006. It is this *Final Order* from which the Appellant now appeals.

III.

STANDARD OF REVIEW

The standard of review for contested cases is set forth at W. Va. Code § 29A-5-4(g) which states as follows:

> [t]he court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:
>
> (1) In violation of constitutional or statutory provisions; or
> (2) In excess of the statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedures; or
> (4) Affected by other error of law; or
> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Moreover, the standard of review of administrative decisions was set forth by the West Virginia Supreme Court of Appeals in *Modi v. West Virginia Board of Medicine,* 195 W. Va. 230, 465 S.E.2d 230 (1995). In this case, the Court stated that "findings of fact made by an administrative agency will not be disturbed on appeal unless such findings are contrary to the evidence or based on a mistake of

law." *Id.* at 239, 239. "[T]he findings must be clearly wrong to warrant judicial interference." *Id.* at 239, 239.

The West Virginia Supreme Court recently reiterated this standard of review in *Adkins v. West Virginia Department of Education,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). In this case, the Court ruled that "the clearly wrong and the arbitrary and capricious standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." *Id.* at 108, 75. "[A] court is not to substitute its judgment for that of the hearing examiner." *Id.* at 108, 75. *See also Walker v. West Virginia Ethic Commission,* 201 W. Va. 108, 492, S.E.2d 167 (1997) (stating that "[a] court may set aside an agency's findings of fact only if such findings are clearly or plainly wrong.").

IV.

ARGUMENT

A. APPELLEE MADE THE NECESSARY FINDINGS BY CLEAR AND CONVINCING EVIDENCE AS REQUIRED BY W. VA. CODE § 18A-3-6

According to W. Va. Code § 18A-3-6, "[t]he state superintendent may, . . . revoke the certificates of any teacher for . . . [i]ntemperance; untruthfulness; cruelty; immorality,. . . ." However, the State Superintendent may not revoke a teacher's certificate if the county board for whom the teacher works levied a discipline less than a dismissal, unless the State Superintendent proves by clear and convincing evidence that one of the above noted actions render the teacher unfit to teach. Moreover, for any conduct involving "intemperance; cruelty; immorality; or using fraudulent, unapproved or insufficient credit to obtain the certificates of the teacher, there must be a rational

nexus between the conduct of the teacher and the performance of his or her job." *See* W. Va. Code § 18A-3-6.

1. Appellee Found By Clear and Convincing Evidence That the Appellant's Actions Were Cruel

One must ask whether the act of a teacher beating his own child in his own home constitutes a basis for revocation pursuant to W. Va. Code § 18A-3-6. Appellee asserts that such an act constitutes both cruel and immoral behavior as defined by W. Va. Code § 18A-3-6. This Court has defined "immorality" within the meaning of W. Va. Code § 18A-2-8, as, "an imprecise word which means different things to different people, but in essence it also connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.'" *Golden v. Bd. of Educ. of Harrison County,* 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981).

"Cruelty," on the other hand, may also mean many things to different individuals; however, the West Virginia Education and State Employees Grievance Board (hereinafter "Board") found that the Appellant's actions were cruel.[5] And so too did the Panel in its Recommended Decision adopted by the State Superintendent by stating that:

> "we find that the clear and convincing evidence established that Mr. Powell engaged in cruelty toward his son Bryce when he repeatedly beat him with a belt on September 26, 2004. The pictures taken by Ms. Coppe (Dept of Ed. Ex. 5) and DHHR (Dept of

[5]The Appellant had filed a grievance against his employer, Hardy County, for his suspension, and the matter was heard by one of the Board's Administrative Law Judges who ruled in favor of Hardy County from which the Appellant did not appeal this decision. In the Board's ruling, the Board found that "[t]here can be no doubt that Grievant's conduct would constitute cruelty if it had been directed toward one of his own students. Because Grievant's actions unquestionably were deliberate and were intended to inflict pain upon a child, [the Board] finds that they did constitute cruelty. . . ." *See Powell v. Hardy County Bd. Educ.*, Docket No. 04-16-412 (April 4, 2005).

> Ed. Ex. 18) of Bryce's injuries tell the story in this case. It is apparent that Bryce was not smacked lightly a couple of times with a belt. Bryce's injuries are severe and clearly indicate that he was struck several times on the shoulder and back."

See *Order* at 6 and Conclusions of Law numbered 4 and 5.

2. Appellee Found Appellant's Actions Rendered Him Unfit to Teach

The Appellant seems not to argue that his actions on that September day were not cruel and immoral; instead, the Appellant argues that his actions do not make him unfit to be a high school teacher and football coach. Moreover, the Appellant argues that the Appellee failed to make a finding by clear and convincing evidence that he was unfit to be a high school teacher and football coach.

However, the Appellant's argument is flawed. Beyond the actions themselves W. Va. Code § 18A-3-6 requires one look "to the conduct involved and then ascertain if that conduct has in some way made the employee unfit to carry out his or her responsibilities." *Waugh v. Bd. of Educ. of Cabell County*, 177 W. Va. 16, 19, 350 S.E.2d 17, 19 (1986).

> "Teachers function as custodians, caretakers, role models, and disciplinarians of their students each day while the children are in their custody. In this case, a teacher had admittedly displayed abusive physical conduct toward a child, which could potentially be repeated in his own classroom with his own students, regardless of ages."

See Powell v. Hardy County Bd. Educ., Docket No. 04-16-412 (April 4, 2005).

The State Board of Education's Teacher Code of Conduct requires all West Virginia teachers to be good adult role models and to abide by policies and regulations. *See* W. Va. Code R. § 126-162-4. The beating of a nine year old child by his father until the child relents to his father's demands does not conform to these standards. Appellant most certainly acted in an immoral and cruel manner by beating his son in order to obtain a confession from him, and the Appellant admitted to beating his

son. These are the facts, and these facts clearly violated W. Va. Code § 18A-3-6, and W. Va. Code R. § 126-162-4.

The Panel made the requisite finding that the Appellant's actions rendered the Appellant unfit to teach by its *Order*. "Therefore, the question is, does Mr. Powell's conduct toward Bryce directly affect the performance of his duties as a teacher? We conclude that it does directly affect the performance of Mr. Powell's duties as a teacher." *See Order* at page 8. The *Order* continues to find in the Conclusions of Law section that the State Board of Education Policy 5902, the Employee Code of Conduct for school personnel, provides that teachers must maintain a high standard of conduct, self-control and moral/ethical behavior, and the *Order* concluded that "Mr. Powell's conduct with Bryce does not meet high standards, does not demonstrate self-control and does not constitute moral and/or ethical behavior." *See Order* at Conclusions of Law numbered 7 and 8.

Moreover, the *Order* noted at page 6 and 7 that the Appellant's actions "clearly crossed the line of acceptable behavior with children. . . . .[w]hile [the Appellant's] conduct was not directed toward a student, it may nonetheless be characterized as deliberate and intended to inflict pain and suffering on a child." Thus, the Panel by clear and convincing evidence found that the Appellant's actions rendered the Appellant unfit to teach as required pursuant to W. Va. Code § 18A-3-6.

3. Appellee Found That a Rational Nexus Exists Between the Appellant's Actions and His Fitness to Teach

As such the remaining question is do the Appellant's actions relate to his performance as a high school science teacher and football coach to which the Appellant argues that his actions of beating his own son have no bearing nor relationship with his responsibilities as a high school teacher or football coach. However, as noted by the Court of Appeals of Iowa:

> "[a]ny founded child abuse report against a teacher has some relevance to licensure, regardless of whether it requires suspension or revocation. Parents and administrators must be able to have confidence in and trust teachers who are given authority and control over the children in their classrooms. . . . Teachers are required to provide leadership and direction for others by appropriate example. Teachers are required to exercise discretion and reasonable judgment in their use of authority."

See Halter v. Iowa Board of Educational Examiners, 698 N.W.2d 337 (Iowa App. Apr. 28, 2005).

Moreover, the State Superintendent not only must maintain the integrity of the teaching profession, but must ensure that those who are licensed by his office have the utmost qualifications and fitness to teach in our classrooms. These licensed professionals enter the classrooms of this state to mold the minds of tomorrow's leaders, and the Panel has been charged with deciding these licensure disciplinary matters. The Appellant argues that the criminal action of beating his son is merely one isolated violation of the State Board of Education Policy 5902, the Employee Code of Conduct for school personnel, which is simply a "conduct unbecoming" finding. The Appellant continues by citing several Supreme Court of Appeals of West Virginia cases which found no rational nexus between school personnel's behavior off campus versus their occupational responsibilities; however, all the cases cited can be easily distinguished from the instant case matter.

Appellant begins by incorrectly stating the case matter of *Bledsoe v. Wyoming County Bd. of Educ.*, 183 W. Va. 190, 394 S.E.2d 885 (1990), involved "sharing a hotel room with someone else at school expense." *See* Appellant's Brief at 18. The *Bledsoe* matter concerned the Wyoming County Board of Education's maintenance supervisor who pled guilty to federal charges of conspiracy to extort money. Apparently, Mr. Bledsoe solicited a political contribution from an individual who supplied materials to the Wyoming County Board of Education. The *Bledsoe* court found that "Mr. Bledsoe's criminal conduct directly related to his work. As the maintenance supervisor, he was in

charge of purchasing a variety of materials for the Board. To extract a political contribution from a supplier strikes at the very heart of the integrity of his job." *Id.* at 192, 887. The court noted in its decision "[w]hether a school board employee has a good work record and is well thought of in the community are not controlling factors where the criminal conduct of the employee bears directly on the employee's occupational responsibilities, ..." *Id.* at 193, 888. Ultimately, the *Bledsoe* court ruled that a rational nexus exists when a criminal act directly involves the employee's occupational responsibilities.[6]

Moreover, Mr. Bledsoe cited two cases that the Appellant in the instant matter relies on which are discussed by the *Bledsoe* court. Bledsoe cited *Waugh v. Board of Educ.*, 177 W. Va. 16, 350 S.E.2d 17 (1986) and *Rogliano v. Fayette County Bd. of Educ.*, 176 W. Va. 700, 347 S.E.2d 220 (1986). The *Bledsoe* court noted that in neither of these two case matters were the school employees convicted of any crimes. In *Rogliano,* the criminal charges were dismissed against the teacher for possessing a small amount of marijuana, and the court found no rational nexus. In *Waugh,* a school custodian became intoxicated and stole a small amount of cash and several small items from a clinic on school property for which he performed custodian work in addition to the school. No criminal charges were ever brought against him and the cash and items were returned the following day. Thus, in these two case matters there were no criminal convictions or time spent incarcerated by the teacher which is distinguishable from the instant case matter.

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[6]The *Bledsoe* court did find a rational nexus between the school employee's actions and his job; however, the court found that "[t]he rational nexus test contained in . . . *Golden* applies exclusively to "acts performed at a time and place separate from employment." Where, as here, the employee uses his office to extort funds from a supplier of his employer this test does not apply." *Id.* 193, 888.

In another case cited by the Appellant, *DiVito v. Bd. of Educ.*, 173 W. Va. 396, 317 S.E.2d 159 (1984), the court did not find a rational nexus. However, the matter involved an unintentional mistaken release of a pornographic cartoon to an art class. The employer dismissed the teacher for wilful neglect, and the *DiVito* court found that the employer acted arbitrarily. The instant matter is easily distinguishable from *DiVito* since here the Appellant admits to intentionally beating his nine-year old son until the child told the Appellant what he wanted to hear. And in the last case cited by the Appellant, the standard was set for judging behavior outside of the classroom in the decision of *Golden v. Bd. of Educ. of Harrison County*, 169 W. Va. 63, 285 S.E.2d 665 (1981). This case involved a teacher who was charged with the misdemeanor offense of shoplifting. The *Golden* court set the standard for finding a rational nexus. "[T]he conduct in question must indicate unfitness to teach. No abstract characterization of the conduct per se as "immoral" is sufficient." *Id.* at 191, 886. "[T]he courts look first to the question of immoral behavior and then to see if that behavior has in some way made the teacher unfit to carry out his or her responsibilities. . . ." *Id.* at 191, 886.

In the matter before this Court, Appellant's criminal behavior is directly related to his fitness to teach, and the Appellant's behavior towards children makes this instant matter distinguishable from the criminal act of shoplifting in the *Golden* matter. However, the Panel was not the only tribunal to find a rational nexus pursuant to the *Golden* standards. The West Virginia Education and State Employees Grievance Board who heard the Appellant's grievance with his employer found a "rational nexus between Grievant's off-duty misconduct and his duties as a classroom teacher." *See Powell.* Moreover, the Appellant was initially indicted for felony child abuse for which he ultimately pled to a misdemeanor count and served thirty (30) days of incarceration. This criminal sentence is by not any means a "light" sentence. The Hardy County Prosecutor's office for the state of West Virginia

found this to be an appropriate sentence given the facts of the case matter and fulfilled its job on behalf of the citizens of West Virginia. Now the State Superintendent of Schools has a job to do in protecting the integrity of the teaching professional and ensuring those licensed by his office posses the utmost qualifications to teach and guide our future leaders. Just because the Appellant had to answer to the county prosecutor, his employer, and WVDHHR for the crime he committed on his nine-year son does not mean that the State Superintendent of Schools should step aside thinking that he has been "punished" enough. The State Superintendent of Schools' job is to ensure the qualifications and character of the state's teachers for which the county prosecutor, the Appellant's employer, and WVDHHR are not considering while performing their jobs.

One needs to remember that the Appellant is considered a role model to his students. He is their "parent" during the time he is responsible for teaching them, and as a parent is many things to their children so is a teacher to his students.[7] He is a disciplinarian and a safe harbor to go to in a time of crisis for a student. A teacher makes a life long mark upon his students and as such has a high standard of conduct to adhere to at all times. The Panel, pursuant to W. Va. Code § 18A-3-6, found a rational nexus between Appellant's beating his nine year old son and his performance as a high school science teacher and coach. *See Order* at Conclusions of Law numbered 6 and 9 (stating that a rational nexus does exist between Appellant's conduct at home and his responsibilities as a teacher).

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[7]*See also* W. Va. Code § 18A-5-1(a) (stating "[t]he teacher shall stand in the place of the parent(s) . . . in exercising authority over the school and shall have control of all pupils enrolled in the school from the time they reach the school until they have returned to their respective homes, ...")

B. APPELLANT HAS FAILED TO SHOW ANY GROUNDS FOR REVERSAL AND DISCRETION MUST BE GIVEN TO THE PANEL'S FINDINGS.

In the instant matter, the Appellant has failed to show that any of the grounds for reversal, vacation, or modification exist. The Appellant simply disagrees with the State Superintendent of Schools as to amount of discipline for this offense. As this Court has repeated in its review of administrative decisions: "[a circuit court's] examination is to be conducted pursuant to the administrative body's findings of fact, regardless of whether the court would have reached a different conclusion on the same set of facts." *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251, 254 (1986), *citing Anderson v. City of Bessemer*, 470 U.S. 564, 574-575 (1995). *See also Rice v. Consolidated Pub. Retirement Bd. of State of W. Va.*, 199 W. Va. 214, 483 S.E.2d 560 (1997); *In re Queen*, 473 S.E.2d 483 (W. Va. 1996); *Frymier-Halloran v. Paige*, 193 W. Va. 687, 458 S.E.2d 780 (1995); *Harrison v. Ginsberg*, 169 W. Va. 682, 286 S.E.2d 276 (1982).

Indeed, in *Adkins v. West Virginia Department of Education*, 556 S.E.2d 72 (W. Va. 2001) (*per curiam*), this Court applied the long-standing rule on the narrow standard of review in the context of an administrative appeal of a teacher certification case. In *Adkins*, the Superintendent of Schools suspended a teacher's license for two years for providing false information on his renewal application for certification. The teacher appealed and the Circuit Court reduced the suspension to one year. In reversing the Circuit Court's decision, this Court stated:

> This Court has advised that a circuit court may not reverse a decision of an administrative agency simply because it would have decided the case differently. *Berlow v. West Virginia Board of Medicine*, 193 W. Va. 666, 672, 458 S.E.2d 469, 475 (1995). As we explained in Syllabus Point 3 of *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996), "the 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Thus, "[t]he scope of review under the arbitrary and capricious standard is narrow, and a court is

> not to substitute its judgment for that of the hearing examiner." *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995).

Id. at 75.

Moreover, this Court noted with its decision in *Berlow v. West Virginia Board of Medicine*, 193 W. Va. 666, 458 S.E.2d 469 (1995), that:

> Boards and commissions like the Board of Medical Examiners are appointed because of their special expertise regarding the standards of their own professions. When a professional person must be disciplined for breaching these standards, the nature and duration of the discipline is best determined by his or her fellow professional, who are in superior position to evaluate the breaches of trust and unprofessional conduct.

The panel is composed of teaching professionals who are the Appellant's peers and best able to judge his conduct. These teaching professionals considered all the evidence as noted in their *Recommended Decision* dated December 5, 2005. This Panel heard all the evidence first hand and reviewed all the reports, including those of numerous health care professionals. The four year suspension levied upon the Appellant is in no way arbitrary, and well within the context of previous suspensions levied by this Panel. There is nothing arbitrary about the Panel using its specialized knowledge of the field of education and teaching in order to determine the appropriate finding. The four year suspension is well within the Panel's discretion, and even though the Appellant may disagree with the Panel's decision there are simply no grounds for reversal in the instant matter.

V.

CONCLUSION

The question before this Court is not whether Brian Powell has been punished enough; it is whether the imposition of a four year suspension furthers the goals of certificate revocation process to protect students and other staff members, to bolster the integrity of the educational process and the confidence of the public in public education and to deter other teachers from such conduct. The

Appellee argues that its imposition of the four year suspension does meet these ends, is neither clearly wrong nor arbitrary and capricious, and should not be overturned by this Court.

Can anyone forget Ohio State University's football coach Woody Hayes losing his temper and slugging a Clemson player who intercepted what would have been the winning touchdown for Ohio State? Here, the Appellant was physically violent with a child, and despite counseling, he never truly grasped the gravity of his conduct. In light of recent events, we as educators do not want to minimize or not treat seriously an act sufficiently serious to warrant temporary removal of the teacher's children from his home, a finding of abuse and neglect by DHHR and a criminal prosecution by the state.

There is a rational nexus between how a teacher/coach resolves disputes with his son with physical violence and how a teacher/coach, who is legally acting in loco parentis, exercises authority and control over his students and team members. The West Virginia Education and State Employees Grievance Board, the West Virginia Commission on Professional Teaching Standards, the State Superintendent of Schools and the Circuit Court of Kanawha County recognized this nexus between this teacher/coach's use of physical violence to resolve a dispute with a child and his teaching and coaching responsibilities. The State Superintendent of Schools respectfully requests that this Court do the same.

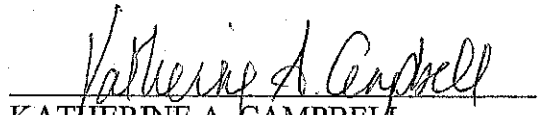
WHEREFORE, based upon the foregoing, the Appellee, Steven L. Paine, State Superintendent of Schools, respectfully requests the Kanawha County Circuit Court's decision be affirmed.

Respectfully submitted,

STEVEN L. PAINE, STATE
SUPERINTENDENT OF SCHOOLS,

By Counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, Katherine A. Campbell, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing "Appellee's Brief" was served upon the following counsel of record by depositing the same, postage prepaid, in the United States mail, this 7th day of May, 2007 addressed as follows:

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